

State of Colorado



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Governor

John Zakhem
Board Chair

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Meeting Minutes December 20, 2005

The State Personnel Board met in public session on Tuesday, December 20, 2005, at the Colorado State Personnel Board, 633 17th Street, Suite 1400, Courtroom 1, Denver, Colorado 80202-3604.

The meeting was called to order at approximately 9:05 a.m. Board members Troy Eid, Donald J. Mares, and John Zakhem were present in person. Elizabeth Salkind was present via teleconferencing. Diedra Garcia was absent.

Kristin F. Rozansky, Board Director; Assistant Attorney General Pam Sanchez, Board Counsel; and Jane Sprague, General Professional III, were present in person.

I. REQUESTS FOR RESIDENCY WAIVERS

A. December 1, 2005 Report on Residency Waivers

Director Rozansky reported on a partial grant of a renewal of a residency waiver request for this month for Rehabilitation Counselors positions of Intern, I, and II at the Department of Human Services. She indicated that she granted the request for Intern and Rehabilitation Counselor I, but denied the request for Rehabilitation Counselor II because no information on recruitment efforts or the result of such effort was provided. In addition, she requested that the agency report to the Board by a date certain the results of their recruitment efforts under the residency waiver.

II. PENDING MATTERS

There were no pending matters before the Board this month.

III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR ON APPEAL TO THE STATE PERSONNEL BOARD

There were no Initial Decisions or Other Final Orders of the Administrative Law Judges or the Director on appeal to the Board this month.

IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR TO GRANT OR DENY PETITIONS FOR HEARING

- A. Vern Mirante v. Department of Natural Resources, Colorado State Parks, Steamboat Lake State Park, State Personnel Board case number 2005G074.

Director Rozansky recused herself from participation in the discussion and voting of this matter. Board Counsel Sanchez directed the discussion and answered questions about the Preliminary Recommendation of the Administrative Law Judge.

Following a question from Ms. Salkind as to the applicability of Executive Order D 001 00 issued by Governor Bill Owens on January 6, 2000, "Protection of Families Policy," Mr. Eid moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing. Mr. Mares seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Mr. Mares, and Mr. Zakhem. Ms. Salkind voted in opposition to the motion.

- B. Renee Dolman v. Department of Human Services, Division of Vocational Rehabilitation, State Personnel Board case number 2006G028.

Mr. Zakhem moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing. Mr. Mares seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR

- A. Wesley A. Lehman v. Department of Corrections, Arkansas Valley Correctional Facility, State Personnel Board case number 2005B125 (November 10, 2005).
- B. Consuelo Gonzales v. Department of Human Services, Colorado State Veterans Center, State Personnel Board case number 2005B091 (November 10, 2005).

- C. Terry J. Miller v. Department of Higher Education, University of Northern Colorado, State Personnel Board case number 2005B112 (November 14, 2005).
- D. Pedro Gomez & Linda Burnett v. Department of Labor and Employment, Workforce Development Programs, State Personnel Board case number 2005B136(C) (November 21, 2005).
- E. Alice Hines v. Department of Corrections, Sterling Correctional Facility, State Personnel Board case number 2004B052(C) (November 21, 2005).
- F. Wolney Cunha v. Department of Transportation, State Personnel Board case number 2005B006 (November 23, 2005).

The Board declined to take any action on its own motion in these matters.

VI. REVIEW OF THE MINUTES FROM THE NOVEMBER 15, 2005 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

Mr. Eid moved to approve the minutes of the November 15, 2005 meeting as submitted. Mr. Mares seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Mr. Mares, Ms. Salkind, and Mr. Zakhem.

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS NOVEMBER 15, 2005 PUBLIC MEETING:

- A. Timothy Bennett v. Department of Corrections, Fort Lyon Correctional Facility, State Personnel Board case number 2005G028.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

- B. Bridget G. Watkins v. Department of Public Health and Environment, Division of Disease Control and Environmental Epidemiology, State Personnel Board case number 2006G005.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

- C. Frederick J. Beall, Gregory J. Bublitz and Gilbert R. Dickman v. Trustees of the Colorado School of Mines, Colorado School of Mines, State Personnel Board case number 2006G020 (C).

The Board voted not to accept Respondent's Request for Board Consideration of Jurisdictional Issues for review by the Board and to adopt the Preliminary Recommendation of the Administrative Law Judge and grant Complainants' petition for hearing.

- D. William J. Kaberlein v. Department of Labor and Employment, Unemployment Insurance, State Personnel Board 2005G096.

The Board voted not to accept the Department of Personnel and Administration's Motion to Limit the Issue at Hearing or, in the Alternative, to Intervene, and to adopt the Preliminary Recommendation of the Administrative Law Judge and grant Complainant's petition for hearing.

- E. Lynn Redden v. Department of Labor and Employment, Unemployment Insurance, State Personnel Board 2005G094.

The Board voted not to accept the Department of Personnel and Administration's Motion to Limit the Issue at Hearing or, in the Alternative, to Intervene, and to adopt the Preliminary Recommendation of the Administrative Law Judge and grant Complainant's petition for hearing.

The Board voted to issue an order to show cause in 2005G094 and 2005G096 as to why the matters should not be consolidated.

VIII. REPORT OF THE STATE PERSONNEL DIRECTOR - Jeffrey M. Wells, Executive Director

Mr. Wells began his presentation by discussing total compensation. He distributed copies of his December 19, 2005 letter to Governor Bill Owens and Representative Tom Plant to the Board members. The total compensation bill was submitted in August 2005 for the following July, in which 4.89% was requested for pay for performance and salary survey (2.8% was salary survey, the rest was pay for performance). The weighted average was 2.49%; see the article by Mr. Wells in last month's *Stateline*. The Office of State Planning and Budgeting (OSPB) recommended 3.64%, a combination of pay for performance and range adjustment. The upward shift in health insurance employer contribution began with Troy Eid and continues with Mr. Wells. The employer contribution was less than 50% of the prevailing level among Colorado employers when Mr. Eid was Personnel Director; it has grown from 56% to 66% of the prevailing levels, and the current recommendation is to move to 75%, as part of a 5-year plan, beginning with Mr. Eid, to increase the employer contribution by the state.

Mr. Wells reported that the Department of Personnel and Administration (DPA) had requested eighteen pieces of legislation, most of which are clean-up. The following have been approved by the Governor's office, with one exception:

- Whistleblower clean-up - removes DPA from its investigatory role;
- Clarification on the Governmental Immunity Act;
- Elimination of the statute from 2003 regarding 0% increase in salary and salary survey;
- A single salary appropriation line, instead of separating the appropriations for pay for performance and for salary survey;
- FLSA clean-up involving sanctions for supervisors who fail to complete performance evaluations from one day to more than one day;
- A "pro-employee" bill which allows the hiring of new people at any salary within a range, including at the top of the range;
- Changes to state insurance from calendar to fiscal year;
- Increase mileage rate from \$.28 per mile (government is \$.48 per mile) (not approved by Governor's office);
- Remands in Board cases - This proposal has been approved by the Governor's office. However, legislative representatives want the Board to agree to any proposal before it is submitted. This legislation would cover the situation when a supervisor has called a 6-10B meeting because of poor performance issues to allow an employee to have input and a representative in the information-gathering process. Sometimes a 6-10B meeting is done that lacks due process (e.g., if the decision to terminate is made too soon or is not done properly). The employee appeals, the Administrative Law Judge (ALJ) concludes that improprieties occurred related to the 6-10B meeting, and even though the punishment fits the crime, e.g. the employee has performed poorly and termination is warranted, the employee is returned to work since the 6-10B meeting was done improperly. Director Wells believes this is an incorrect result because an ALJ hearing is a *de novo* hearing that corrects the due process deficiency; therefore, the employee should not be returned to work. Under this legislation, if the ALJ concludes that all elements are correct, then the employee should not be put back to work. There are no sponsors for this bill as yet, and Paul Farley, Deputy Executive Director, and Director Rozansky are meeting to discuss a proposed draft of the legislation.

When asked about procedural remand, Mr. Wells stated that this concept was related to the above, but the term "procedural remand" had some tones of DPA trying to take away some authority of the Board, which DPA is not seeking to do. Mr. Eid asked if the same thing could be accomplished by a Board rule. Ms. Sanchez stated that without having looked at the issue before, her sense was that a statutory change is necessary to do this. Mr. Eid then stated that there are surely court decisions about a "botched 6-10," and the harmless error standard should be applied. Ms. Sanchez opined that if the 6-10B were the only error, it may not be sufficient to restore the employee to his position but it would also depend on the nature of the errors and the surrounding

circumstances. A denial of an employee's due process rights was not generally just a procedural error.

Mr. Wells stated that currently any technical error could restore the employee to his position, and there used to be a rule requiring the notice of 6-10B meeting be sent via certified mail or the discipline could be thrown out. Ms. Salkind stated that Board rules exist for a reason and if not followed, there need to be ramifications. Mr. Wells stated that if the employee did commit the acts and the discipline is at the appropriate level of punishment, it should not be reversed because of a technicality. Rather, there could be a sanction against the department for not doing the 6-10B properly. Ms. Salkind countered with the question of why wages would be awarded if the error were procedural or inconsequential.

Director Rozansky stated that she had read the Board decision which raised DPA's concern in this area, but does not agree with Messrs. Wells and Farley on their interpretation of that case. Mr. Zakhem inquired if putting such a situation in the Board's discretion would be labeled "harmless error." Ms. Salkind asked if the Board has the ability to do this now, why add to the Board's discretion. Mr. Eid asked if it were concerning the 6-10 meeting, was it harmless error or not? In principle, he agreed it was a great idea.

Ms. Sanchez noted, however, that it was already within the Board's authority to remedy a situation like this, should it arise. If the Board agreed with the ALJ's findings of fact, but determined that the legal conclusion the ALJ reached and the decision to return the employee were in error, then the Board is currently free and authorized to make that change, thus rendering this proposed legislation unnecessary. Furthermore, Mr. Wells' proposal asks for formalization that will lock the Board into a certain interpretation of facts that deal with an employee's due process rights. Ms. Salkind inquired if procedural errors versus substantive errors would be outlined in the proposal.

Mr. Wells discussed a corollary problem: Employee X works at DOC as a CO I or II, so returning him to work with 200 others in that same job class would not be a problem. However, if an entomologist is returned to work in a position just refilled with another who is now certified in class, have we denied the second and now displaced employee due process? Mr. Farley stated both employees have a property right to the same job. Mr. Mares stated that one faces this issue in many areas and there is a need to come up with an avenue for notice to the employee who may be displaced. The second person would be trial service and notice should be given to that person. In addition, Messrs. Wells and Farley think there is a need for a remedy for such employees. Mr. Zakhem asked if a probationary period could be increased. Director Rozansky stated that if

whoever was appointed was in trial service, then that employee would not be certified until the dispute was concluded. In addition, because probationary periods are set, by the state constitution, at twelve months, the probationary period may not be extended. Mr. Wells requested that the Board reach a decision regarding this matter by the next Board meeting, January 17, 2006.

IX. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- Cases on Appeal to the Board and to Appellate Courts

B. OTHER BOARD BUSINESS

- Staff Activities

In addition to the above referenced matters, Ms. Rozansky introduced Administrative Law Judge Denise M. DeForest to the Board members. She informed the Board that the end of Elizabeth Salkind's term, resulting in a vacant position on the Board, will trigger the 2006 Board Election, which is to be announced in the November/December 2005 *Stateline*. A timeline has been worked out for the election, with nominating petitions due on February 15, 2006, and voting instructions are to appear on the back of the May 1, 2006 paycheck stubs.

Director Rozansky informed the Board that the Administrative Law Judge Performance Review Commission is to be increased by three members, and the Board been invited to submit names of prospective members. Per agreement of all Board members present at the meeting, the Board is formally asking that it appoint three members to the Commission. Mr. Zakhem proposed that candidates be solicited and that the Board members be provided with the list of current members of the Commission. Ms. Rozansky informed the Board that the current proposal is for the Commission to be broken down into panels of three commissioners to watch an ALJ for one day, read three of his/her decisions, and listen to parts of hearings.

Finally, the Director reported on the December 16, 2005 Continuing Legal Education seminar presented by Board staff to approximately 60 attorneys and human resources professionals at Holland & Hart. The presentation was recorded on DVD and the outline for the seminar will be placed on the Board's website. In addition to staff presentations, Board members John Zakhem and Elizabeth Salkind presented comments during the "Appeals to the Board" section of the program. Mr. Zakhem publicly commended Director Rozansky and the entire staff for a job well done and the benefits

of the Board putting on a public face and providing practice tips for the areas covered by the program. Ms. Salkind remarked that the materials were "wonderful" and "thorough." Ms. Rozansky stated her intention to distribute three DVDs to the members who did not attend the program and one DVD to Higher Education for training purposes. Mr. Zakhem indicated that he sent thank-you letters to Stephen G. Masciocchi, Partner, and Edward H. Flitton, Managing Partner, at Holland & Hart.

C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

X. PROPOSED LEGISLATION AND/OR RULEMAKING

Director Rozansky provided the Board with the December 9, 2005 Memorandum to the Committee on Legal Services from Nicole Hoffman and Dan Cartin, Office of Legislative Legal Services, Re: Rules of the Colorado State Personnel Board and rules of the Executive Director of the Department of Personnel. With regard to Board Rule 8-25B (Whistleblower claims), the following language concerning whistleblower investigations in the rule conflicts with statute: "The Board upon a showing of good cause may extend this time." Proposed legislation by the Legislative Audit Committee would eliminate the whistleblower investigation by the Department of Personnel and Administration altogether. Thus, Ms. Rozansky proposed that in the anticipated March 21, 2006 Rulemaking Hearing, the conflicting sentence be struck from Board rule. The Director also informed the Board that the hearing regarding contested Director's Procedures has been reset for January 9, 2006, due to complaints that there was not enough notice given for the meeting scheduled in December.

XI. EXECUTIVE SESSION

- A. Case Status Report
- B. Minutes of the November 15, 2005 Executive Session
- C. Other Business

The meeting adjourned by consensus.

APPROVED THIS 17th DAY OF JANUARY, 2006.

John Zakhem, Chair

Troy Eid, Member

Donald J. Mares, Member

Elizabeth Salkind, Member